

Kahn's and Company, Division of Consolidated Foods Co. and Reginald Akers. Case 9-CA-3752

June 24, 1981

**ORDER DENYING MOTION FOR
RECONSIDERATION**

On October 10, 1980, a panel of the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.¹ On October 23, 1980, Respondent filed a Motion for Reconsideration of Decision and Order. In its motion Respondent contends that the Board erred by finding that employee Reginald Akers was entitled to reinstatement as a remedy for Respondent's violation of Akers' *Weingarten*² rights. Respondent also contends that the Board denied it due process of law by retroactively applying the test established in *Kraft Foods, Inc.*,³ for determining when reinstatement is warranted to remedy the violation of *Weingarten* rights.

The Board, having duly considered the matter, finds that the Motion for Reconsideration of Decision and Order raises no substantial issues that were not considered by the Board in its original Decision and Order. Furthermore, it is clear that sufficient evidence was adduced at the hearing to allow the proper application of the test established in *Kraft Foods, Inc.*, *supra*, and that Respondent was not, therefore, denied due process of law.

Accordingly, the Board denies Respondent's Motion for Reconsideration of Decision and Order as lacking in merit.

¹ 253 NLRB 211.

² *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

³ 251 NLRB 598 (1980).

MEMBER JENKINS, concurring:

As a result of my review of this matter, however, I conclude that certain clarifications of the original Decision and Order would be appropriate. In that Decision the Board disagreed with the Administrative Law Judge's finding that the discharge itself stemmed from the unlawful interview and thus constituted an independent violation of Section 8(a)(1) of the Act; however, the Board also found that Respondent had failed to establish that its decision to discipline Akers was not based upon information obtained at the unlawful interview and, therefore, that a make-whole remedy was appropriate. The apparent conflict between these two findings is illusory, as can be most clearly demonstrated by reference to the burdens of proof in the different circumstances.

In order to find an independent violation of Section 8(a)(1) of the Act arising out of the imposition of discipline based upon information obtained at an unlawful interview, the General Counsel must have established affirmatively that the tainted information was relied on in imposing the discipline. In determining the appropriateness of a make-whole remedy, however, the burden is upon Respondent to establish that it did not rely on such information in imposing the discipline.

In the instant matter, the General Counsel failed to establish affirmatively that Respondent utilized the information obtained at the unlawful interview simply because it did not know that such proof was necessary. Respondent, on the other hand, went to considerable lengths to establish that the interview was unrelated to the discipline in an effort to distinguish this matter from *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251. As stated in the original Decision and Order, Respondent failed in its effort.